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Rapporteur: Mr. Igor Ivanovich Lukashuk

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

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CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

1. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 1/

2. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 2/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

3. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 3/ and a study prepared by the

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1/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see Yearbook ... 1978, vol. II (Part Two), pp. 150-152.

2/ For the five reports of the Special Rapport, see Yearbook ... 1980, vol. II (Part One) p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook....1982, vol. II (Part One), p. 51, document A/CN.4.360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One) p. 155, document A/CN.4/383 and Add.1.

3/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 4/

4. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996). 5/

5. At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 6/ The Commission deferred consideration of the tenth and eleventh reports of the Special Rapporteur and instead concentrated work on the articles of this topic already before the Drafting Committee which had before it the following draft

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4/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

5/ For the 12 reports of the Special Rapporteur, see:

Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394;
Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402;
Yearbook ... 1987, vol. II (Part One) p. 47, document A/CN.4/405;
Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413;
Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423;
Yearbook ... 1990, vol. II (Part One), p. 83, document A/CN.4/428;
Yearbook ... 1991, vol. II (Part One), p. 71, document A/CN.4/437;
Yearbook ... 1992, vol. II (Part One), p. 75, document A/CN.4/443;
Yearbook ... 1993, vol. II (Part One), document A/CN.4/450; document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475 and Add.1.

6/ For the text, see Yearbook ... 1988, vol. II (Part Two), p. 9. At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), para. 471.

articles: draft articles 1 to 10 for Chapter I (General provisions) and Chapter II (Principles); 7/ and a draft which numbered as article 10 (non-discrimination) to article 20 bis. 8/

6. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 9/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages. First to complete work on prevention of transboundary harm and to proceed with remedial measures. 10/ The Commission decided that, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

7. At its forty-sixth (1994) and forty-seventh sessions (1995), the Commission provisionally adopted on first reading the following draft articles with commentaries thereto: 1 (scope of the present articles); 2 (use of terms); 11 (prior authorization); 12 (risk assessment); 13 (pre-existing activities); 14 (measures to prevent or minimize the risks); 14 bis [20 bis] (non-transference of risk); 15 (notification and information); 16 (exchange of information); 16 bis (information to the public); 17 (national security and industrial secrets); 18 (consultations on preventive measures); 19 (rights of the State likely to be affected); 20 (factors involved in an equitable balance

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7/ The articles are found in Yearbook ... 1988, vol. II (Part One) p. 251, document A/CN.4/413 and were referred to the Drafting Committee at the fortieth session in 1998.

8/ The articles are found in Yearbook ... 1993, vol. II (Part One), document A/CN.4/450 and referred to the Drafting Committee at the forty-fifth session in 1993.

9/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10) pp. 127-129.

10/ For a detailed recommendation of the Commission, see Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10) pp. 196-198.

of interests); article A [6] (freedom of action and the limits thereto); article B [8 and 9] (prevention); article C [9 and 10] (liability and reparation); and article D [7] (cooperation). 11/

B. Consideration of the topic at the present session

8. At the present session the Commission had before it the twelfth report of the Special Rapporteur 12/ which he introduced at the 2450th meeting on 28 June 1998. The report reviewed the various liability regimes proposed by the Special Rapporteur in his previous reports.

1. Establishment of the Working Group

9. The Commission at its 2450th meeting on 28 June 1996 decided to establish a Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission. 13/

2. Outcome of the work carried out by the Working Group on International liability for injurious consequences arising out of acts not prohibited by international law

10. The Working Group referred to in paragraph 9 above submitted a report which was introduced by its Chairman at the 2465th meeting of the Commission on 19 July 1996. The report of the Working Group is annexed to the present report.

11. The Commission considered that the report of the Working Group represented a substantial advance on the work on the topic. It presented a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto. Though the Commission was not able to examine the draft articles at the current session, it felt that, in principle, the proposed draft articles provided a basis for examination by the General Assembly at its fifty-first session.

11/ Articles 1, 2, 11 to 20 were adopted in 1994 and articles A to D were adopted in 1995.

12/ Document A/CN.4/475.

13/ For the Composition of the Working Group see para. ... above.

12. The Commission would welcome comments by the General Assembly on the specific questions referred to in the commentary to article 1, the approach to the issue of compensation or other relief as set out in Chapter III, as well as on the draft articles as a whole. Comments which Governments may wish to make in writing would also be welcome. These comments are necessary to provide guidance for the subsequent work of the Commission on this topic.